92-1729

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF
THE UNITED STATES

October, 1992 Term

Theodore Thomas Boburka,

Petitioner

v.

Frank Adcock, M.D.,

Respondent

**On Writ Of Certiorari To
The United States
Court Of Appeals
For The Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review:

In this case, the jury awarded the Plaintiff, Theodore Boburka, hereinafter *Boburka*, a judgment against the Defendant, Frank Adcock, M.D., hereinafter *Adcock*, for medical malpractice.

The Trial Judge concurred in the verdict and subsequently denied Adcock's Motion for a Judgment Notwithstanding the Verdict, or Alternatively for a New Trial, specifically holding that sufficient evidence had been presented to support the verdict of the jury.

Adcock appealed the Trial Court's denial of his Motion for a for a Judgment Notwithstanding the Verdict, or Alternatively, for a New Trial to the United States Court of Appeals for the Sixth

Circuit. The Sixth Circuit determined that it had jurisdiction to review the District Court's denial of Adcock's trial Motion for Directed Verdict, and his post-trial Motion for a Judgment Notwithstanding the Verdict or in the Alternative, for a New Trial. The Court of Appeals acknowledged that the "abuse of discretion" standard is the proper standard of review to use in deciding whether the Trial Court properly denied Adcock's Motions. The Sixth Circuit then reversed the verdict of the jury and Trial Judge and inexplicably rendered a verdict in favor of Adcock, not on the grounds of an "abuse of discretion", but because there was "insufficient evidence" to support the verdict.

(1) The first question presented for review is whether the United States Court of Appeals for the Sixth Circuit properly defined and applied the "abuse of discretion" standard under the facts of this case, especially since other circuits define and apply the abuse of discretion standard in a different manner, as for example the case of *Gorsalitz v. Olin Mathieson Chemical Corporation*, 429 F.2d 1033 (Fifth Circuit, 1970) and the case of *Taylor v. Washington Terminal Company*, 409 F.2d 145 (D.C. Circuit, 1969); *cert. denied* 396 U.S. 835, 90 S.Ct.93, 24.L.Ed. 2d 85.

A second issue arises from a rather bizarre set of circumstances, which, Boburka submits, requires explanation. Specifically, in its opinion,

the Court of Appeals discussed at length the case of *Kilpatrick v. Bryant*, No. 53, 1990, Tennessee Appeals, LEXIS 785 (Tennessee Court of Appeals, November 1, 1990), because the Sixth Circuit found the case "somewhat troubling". The Sixth Circuit distinguished the case, but mistakenly believed that the *Kilpatrick* case had not been appealed to the Tennessee Supreme Court. But, the *Kilpatrick* case had been appealed to the Tennessee Supreme Court! In fact, oral argument had been made, but the Tennessee Supreme Court had not, as yet, rendered an opinion in the case.

Accordingly, Boburka filed a Petition for Rehearing advising the Court of Appeals that the Sixth Circuit was mistaken and that the *Kilpatrick*

case had been appealed. Boburka thus requested that the decision of the Sixth Circuit be stayed until a decision from the Tennessee Supreme Court was received or, alternatively, that the question troubling the Sixth Circuit be certified to the Tennessee Supreme Court, pursuant to Rule 23 of the *Rules of the Supreme Court of Tennessee*, which specifically provides the means of certification.

(2) Thus, the second question presented for review is whether the United States Court of Appeals for the Sixth Circuit erred in denying Boburka's Petition for Rehearing, since the Opinion of the Sixth Circuit contained a material, factual

error on its face concerning an issue that had troubled the Sixth Circuit in its Opinion.

And, as a corollary question to the foregoing, whether the United States Court of Appeals for the Sixth Circuit erred in failing to either stay its Judgment pending the decision of the *Kilpatrick* case by the Tennessee Supreme Court or, alternatively, by certifying said question to the Tennessee Supreme Court.

And as a second corollary question to the foregoing, whether this Court should accordingly exercise its right and power of oversight and supervision over the Courts of Appeal to require that they correct manifest errors in their opinions

and that they should stay or certify questions when necessary to the ends of justice.

Finally, although the Sixth Circuit stated that it was bound by the Law of the State of Tennessee "...with regard to sufficiency of the evidence", it completely failed to adhere to the Law of the State of Tennessee in reversing the Trial Court's verdict on the grounds that the evidence was not sufficient. Such a determination is contrary to other decisions of this Court, such as *Moore v. Illinois Central Railroad*, 312 U.S. 630, 61 Sup.Ct. 754, in that the Sixth Circuit ignored the latest Decision rendered by the Supreme Court of Tennessee regarding the standard of review on the issue of sufficiency of the

evidence and instead substituted its own interpretation.

(3) Thus, the third and final question presented for review is whether the United States Court of Appeals for the Sixth Circuit erred in failing to follow the standard of review required by the Tennessee Supreme Court in the case of *Truan v. Smith*, 578 S.W.2d. 73 (Tenn. 1979).

And as a corollary question, whether the Sixth Circuit has, in effect, denied Boburka his right to trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States of America, and by Article 1, Section 6 of the Constitution of the State of Tennessee.

A List Of All Parties:

A list of all parties appear in the caption of the case.

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The relevant opinions to this Appeal are the following:

(1) The Memorandum and Order denying Adcock's Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, or Remittitur.

(2) The Opinion of the United States Court of Appeals for the Sixth Circuit reversing the Judgment of the United States District Court for the Western District of Tennessee, Western Division, being *Theodore Thomas Boburka, Plaintiff/Appellee, v. Frank Adcock, M.D., Defendant/Appellant*, (Sixth Circuit, 1992), Number 91-6105, rendered on November 9, 1992.

(3) The Order of the United States Court of Appeals for the Sixth Circuit denying Boburka's Petition for Rehearing on January 11, 1993.

Statement Of Jurisdictional Grounds

The United States District Court for the Western District of Tennessee had original jurisdiction of this civil case because of diversity of citizenship of the parties, as provided in 28 *U.S.C.* §1331. The Plaintiff was a citizen of the State of Florida, and the Defendant was a citizen of the State of Tennessee. Additionally, the amount in controversy exceeded Ten Thousand Dollars ($10,000.00), as required by §1331, in February of 1988, the time of the filing of the Complaint. The District Court entered a Final Judgment on the jury verdict for the Plaintiff, in the amount of Six Hundred Thousand Dollars ($600,000.00), on June 18, 1991.

In an Opinion dated November 9, 1992, the United States Court of Appeals for the Sixth Circuit, in Cause Number 91-6105, reversed the jury verdict of the Trial Court and rendered a verdict for the Defendant/Appellant Adcock, on the grounds that Adcock was entitled to a Directed Verdict because the medical testimony offered by the Plaintiff/Appellee, Boburka, was "...insufficient to demonstrate that it was more likely than not that Dr. Adcock's negligence caused the increased damage to Boburka's heart".

Boburka filed his Petition for Rehearing, pointing out that the Court's Opinion contained a factual error on its face and, further, that under Tennessee Law, the Court of Appeals should not

have reweighed the evidence and granted Directed Verdict on Appeal. The United States Court of Appeals for the Sixth Circuit denied Boburka's Petition for Rehearing on January 11, 1993.

Petitioner Boburka submits that the United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit by Writ of Certiorari under 28 *U.S.C.* §1254(1).

The Applicable Constitutional Provisions and Statutes

(1) The Seventh Amendment to the Constitution of the United States of America, states:

> In suits of Common Law, where the value in controversy shall exceed Twenty Dollars ($20.00), the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the

United States, then according to the Rules of the Common Law.

(2) Article 1, §6 of the Constitution of the State of Tennessee:

> That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

(3) *Tennessee Code Annotated* §29-26-115 (a) which provides in relevant part:

> In a malpractice action, the claimant shall have the burden of proving...:
> (3) As a proximate result of Defendant's negligent act or omission, the Plaintiff suffered injuries which would not otherwise have occurred.

Statement Of The Case:

Theodore T. Boburka sued Frank Adcock, M.D. on February 8, 1988, alleging that Adcock committed malpractice by failing to properly

examine, diagnose and treat Boburka for an acute cardiac condition during two visits to the emergency room on August 18, 1984. Defendant filed an Answer on February 25, 1988. On May 31, 1989, Defendant filed his Motion for Summary Judgment. On August 16, 1989, Judge Odell Horton, Jr. denied the Defendant's Motion for Summary Judgment.

On August 2, 1990, Defendant filed a Motion *In Limine* to exclude the testimony of Dr. Franklin T. Tew, and Magistrate James Allen denied the Defendant's Motion *In Limine* on October 23, 1990. Defendant filed exceptions to that Order, which were overruled.

Trial thus began on June 3, 1991 and

continued until the close of proof on June 7, 1991. After the Plaintiff rested, Defendant moved for a Directed Verdict, part of which the Court denied; and the remainder of which the Court took under advisement. After the Defendant rested, the Plaintiff testified in short rebuttal. After the close of the proof, the Defendant renewed his Motion for Directed Verdict, which was denied; the Trial Court finding that sufficient grounds existed to go to the jury. Following the closing arguments, the jury was charged and given special jury instructions.

The evidence at trial proved the following pertinent facts: Theodore T. Boburka, age 53, and a veteran had been married to Marion J. Boburka over 30 years. They have four children. After

college, Boburka entered the construction industry and became a construction engineer.

In 1972, Boburka contacted his regular physician, who directed him to an emergency room. After a series of blood tests, EKGs and enzyme tests, he was advised that there was a possibility of a heart problem. He was referred to a cardiologist who performed a cardiac catheterization, which revealed that he had a 70% blockage in his left anterior descending coronary artery.

From that time forward, Boburka underwent periodic check-ups, electrocardiograms, treadmill tests and blood tests, and took medication. Three years later, a second catheterization was done, which demonstrated additional blockage. However,

surgery was not recommended.

Because his job required him to travel around the country, it was recommended that he take his EKGs with him and find a doctor in each locale.

In 1984, Boburka went to Tennessee, to oversee construction at the Federal Express Corporation. His daughter, age 18, accompanied her father to Memphis. Shortly thereafter, Boburka contacted Dr. William Burrow and advised Dr. Burrow of his history and treatment for heart disease, including providing copies of his EKGs, prescriptions and showing Dr. Burrow the bottle of nitroglycerine he carried with him.

On August 15, 1984, while returning from a trip, Boburka ran through an airport to catch a

plane. The exertion caused him considerable pain. Upon arrival in Memphis, at approximately 11:00 p.m., the pain became so severe that a wheelchair was necessary for Boburka to get to his car.

The next morning, August 16, 1984, Boburka's pain was gone, but some tenderness remained. At 4:00 p.m., because he still did not feel very well, his daughter drove him to see Dr. Burrow, where he advised the doctor that he had been short of breath, felt left-sided chest pains and had some pain in his arms the day before. Dr. Burrow noted an insignificant weight loss, and that his vital signs and color were good. Dr. Burrow took a chest x-ray and did an EKG, and he noted that although the EKG was abnormal, it was

unchanged from the prior EKG, which Boburka provided, and did not feel any additional heart treatment was necessary. However, he advised him that, in the event of any increase in his pain, he should immediately go to the emergency room.

On August 18, 1984, just before 2:00 a.m., Boburka awoke in a great deal of pain and needed to go to the emergency room. His daughter drove him to the nearest hospital. In the emergency room, Boburka was in a lot of pain, was pale and shaky and had difficulty walking. He was in much greater pain than he had been during the previous two days. The receptionist allowed him to go on back to the treatment area. Boburka took his EKGs with him to the treatment area.

Boburka entered the hospital at 2:01 a.m. on August 18, 1984. In the examining room, a nurse took his vital signs at 2:05 a.m. and obtained a medical history. Dr. Adcock then entered the room, poked Boburka in the back a couple of times and asked if that made it hurt more. Boburka said it did not. Boburka told Adcock about the episode at the airport and advised him that he was a heart patient and offered the envelope with his EKGs, which Adcock refused. Boburka further advised Adcock that he had seen Dr. Burrow, who advised him to immediately go the emergency room if he developed pain. Prior to August 18, 1984, Boburka had never experienced pain that severe in his entire life. In addition, every physician that had treated

Boburka had examined his ears, nose, mouth, listened to his chest and felt his abdomen. Adcock did none of these things. After Adcock's cursory examination, which, based on the testimony and hospital records, lasted no more than three minutes, Adcock ordered Demoral and a prescription for phenergan to relieve the pain. According to Nurse Graves' testimony, the shot was given at exactly 2:15 a.m. and, since it took four minutes to prepare the shot, Adcock must have ordered the shot at 2:11 a.m., allowing only six minutes for the entire examination and history by Dr. Adcock. Boburka left the emergency room at 2:20 a.m. After filling the prescriptions at a drug store, he returned home and took the medication and laid down with the

heating pad. However, he got no relief from the heating pad or the pain killers. The pain was like a very sharp object being driven into his shoulder blade every time he took a deep breath. At 4:00 a.m., having acquired no relief, Boburka called the emergency room and advised them of his situation. Based on that conversation, he returned to the emergency room, arriving at 6:45 a.m., a little more than four hours after the first visit. During the second visit, neither Adcock nor the nurse took any vital signs, even though Boburka stated that the first shot had given him no relief. Adcock stated that he was going to give Boburka another shot, but Boburka requested that he find out what was wrong before giving him another shot. Adcock ignored

this request and warned Boburka that if he returned, the police would be summoned. Boburka then left, went home, took the medication, and fell asleep.

Between approximately 7:00 a.m and 8:00 a.m. that morning, because he did not improve, Boburka's daughter made an appointment to see a Dr. Mellor. Later, after having slept most of the afternoon, during which time the acute phase of the heart attack occurred, Boburka went to Dr. Mellor. At that time, when the pain had subsided considerably, Dr. Mellor, not seeing any evidence of an ongoing heart attack, gave him a prescription for muscle strain. Boburka returned to his home and rested the remainder of Saturday and Sunday. On Monday, August 20, 1984, Boburka returned to

work briefly. He also worked part of the day on Tuesday. On Thursday, he left work early, and, feeling like he had the flu, went home the evening of August 23, 1984 and went to bed. The next morning, Boburka felt "lousy", and he had a hard time even bending his body. Feeling stuffed, constipated and nauseous, he had his daughter drive him back to the emergency room. When he arrived, he was immediately escorted back to the examining room. He recalled Adcock coming in and berating him for returning, and Boburka's first words, as Adcock admits, upon seeing him, were "Oh no, not you again!" Boburka told Adcock that he was very sick and either Adcock should take care of him or find someone who would. Adcock

poked Boburka in the stomach and asked what was wrong. Boburka related his symptoms, and further said he couldn't breathe. Adcock did not examine him further and told Boburka that he didn't believe anything was wrong with him. He further told Boburka that his shift was over, and that the next doctor would look at him. Boburka passed out. Adcock admitted that he knew that Boburka was in a "cardiac calamity" and was "critically ill" on August 24, 1984, and that without intervention Boburka would not have survived. Yet, Adcock further admitted that when his replacement came on duty, he left the examining room and never again assisted in the care of Boburka, even though he claims to have diagnosed Boburka as being in

congestive heart failure. The new doctor immediately ordered a number of treatments to stabilize Boburka's rapidly deteriorating condition, including intermittent positive pressure breathing, a bronchodilator, nitroglycerine, nitrol ointment, a diuretic, a dextrose intravenous fluid, morphine sulfate, aminophylline, rotating tourniquets and a nasal dilator. In this manner, he managed to stabilize Boburka so that he could be immediately taken, via helicopter, to the main hospital, where a cardiologist could continue his treatment.

On August 25, 1984, the day after he arrived at Methodist Central, near death, a doctor's progress note indicated that Boburka was "sitting up, looking fine and reading a NOVEL!!"

On August 31, 1984, Boburka underwent cardiac catheterization, which revealed severe coronary artery disease. Although not an ideal candidate for cardiac surgery, his physicians felt he was a worse candidate for continued medical management and recommended surgery. A triple by-pass was performed on September 4, 1984, and he was discharged on September 26, 1984.

Boburka was in intensive care for six days after his admission to Methodist Central. When he left intensive care, he received an unsolicited telephone call from Adcock, in which Adcock tried to tell Boburka that it was "just simply one of those things". Adcock apparently tried to apologize, but Boburka did not want to talk and hung up on him.

After discharge from the hospital, Boburka returned home to St. Cloud, Florida, where he has been under the care of Dr. Franklin Tew, Plaintiff's expert witness. Since his discharge, Boburka suffers from lack of stamina and has trouble tolerating the heat. Prior to August of 1984, he enjoyed doing yard work, taking extended walks, doing his work as a construction engineer, playing with his grandchildren and washing his car, none of which he can any longer enjoy.

As a result of the failure of Adcock to properly examine, diagnose and treat Boburka on August 18, 1984, Boburka suffered permanent loss of heart muscle with severe reduction of heart pumping function, which significantly reduced his

longevity. Dr. Franklin T. Tew, testified that Boburka had an excellent chance of being managed and of having a significant reduction in the amount of heart injury had he been hospitalized on August 18th. Dr. Tew specifically stated that Dr. Adcock's negligence in failing to treat Boburka on August 18th was the proximate cause of increased damage suffered by Plaintiff over the next six days resulting in congestive heart failure. In addition, Boburka unnecessarily endured pain and suffering and fear for his life, and fear that he may now die from a subsequent heart attack due to his reduced heart function.

On June 17, 1991, the jury answered the Special Interrogatories, specifically finding that Dr.

Adcock had been negligent at the 6:45 a.m. visit, that his negligence caused damage to the Plaintiff and returned a verdict for the Plaintiff in the amount of $600,000.00. The Judgment was filed on June 18, 1991.

Defendant filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative New Trial or Remittitur on June 27, 1991. The Court filed an Order denying the Motion on July 30, 1991. The Defendant then filed a Motion to Reconsider their post-trial Motion on August 8, 1991, and it was denied by the Court. Defendant then filed his Notice of Appeal on August 29, 1991, in which he appealed from:

> ... the Order Denying Motion for Judgment Notwithstanding the Verdict,

> or in the Alternative, for New Trial, or Remittitur entered in this action of the 30th day of July 1991, and from the Order Denying Motion to Reconsider Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for New Trial, or Remittitur entered on the 20th day of August, 1991.

No Notice of Appeal was filed as to the Final Judgment. The Appeal complained of Orders entered by Judge Horton concerning the Motions for New Trial or Directed Verdict.

On November 9, 1992, the United States Court of Appeals for the Sixth Circuit, Cause Number 91-6105, rendered its Opinion, in which it held that Adcock's Motion for Directed Verdict and his post-trial Motions for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial had been properly preserved. The

Court of Appeals then reweighed the evidence and determined that, under Tennessee Law, the evidence was insufficient to sustain the verdict, that Adcock had been entitled to a Directed Verdict and thus rendered a verdict for Dr. Adcock.

In its discussion of Tennessee Law, the Sixth Circuit was troubled by a Tennessee Court of Appeals case, *Kilpatrick v. Bryant*, Number 53, 1990 Tenn.App. LEXIS 785 (Tenn.Ct.App. November 1, 1990), which the Sixth Circuit mistakenly believed had not been appealed to the Supreme Court of Tennessee.

Boburka, on Petition for Rehearing, noted that the *Kilpatrick* case had been appealed to the Supreme Court of Tennessee; that certiorari had

been granted and oral argument completed, but that the Supreme Court of Tennessee had not, as yet, rendered an opinion. He requested the Court to stay its decision until the Supreme Court of Tennessee had ruled or alternatively, to certify the question in this cause to the Supreme Court of Tennessee.

In addition, Boburka noted that, under Tennessee Law, the Court of Appeals was not entitled to reweigh the evidence, and that if there was any material evidence which supported the verdict, then the verdict must be affirmed.

On January 11, 1993, the United States Court of Appeals for the Sixth Circuit denied Boburka's Petition for Rehearing. Accordingly, Boburka

applies for a Writ of Certiorari to this Court.

ARGUMENT

I. The Abuse Of Discretion Standard

In this cause, Adcock, in his Notice of Appeal, only appealed from:

> ...the Order Denying Motion Notwithstanding the Verdict, or in the Alternative for a New Trial, or Remittitur, entered in this action on the thirtieth (30th) day of July, 1991, and from the Order Denying Motion to Reconsider Motion for Judgment Notwithstanding the Verdict, or in the Alternative for a New Trial, or Remittitur entered on the twentieth day of August, 1991.

However, in its Opinion, the Sixth Circuit held that Adcock's Notice of Appeal adequately preserved, for appeal, all of the issues he raised before the Court of Appeals and held:

> Therefore, we shall review the district court's denial of Dr. Adcock's Motion for Directed Verdict, and his post-trial Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial.

(See Opinion of Sixth Circuit at page 13)

The Sixth Circuit then set forth the standard upon which it would review the Trial Court's denial of the Motions stating:

> We review the trial court's grant or denial of a motion for a new trial for abuse of discretion, which is defined as a "definite and firm conviction that the Trial Court committed a clear error of judgment." *id.* [quoting *Logan v. Dayton Hudson Corporation*, 865 F.2d 789,790 (Sixth Circuit, 1989)]

(See Opinion of Sixth Circuit at page 14)

However, the definition of the abuse of discretion used by the Sixth Circuit is contrary to that used by

other circuits, such as the United States Court of Appeals for the Fifth Circuit and for the District of Columbia. In particular, the United States Court of Appeals for the Fifth Circuit, in the case of *Gorsalitz v. Olin Mathieson Chemical Corporation*, 429 F.2d 1033 (Fifth Circuit, 1970), also held that the Court of Appeals may review the District Court's ruling on a motion for a new trial only for abuse of discretion. In making this holding, the Fifth Circuit followed the definition given by the D.C. Circuit Court of Appeals in the case of *Taylor v. Washington Terminal Company*, 133 U.S. App. D.C. 110, 409 F.2d 145; *cert. denied* 396 U.S.835,1990 S.Ct..1993 24 L.Ed.2d 85, which specifically defined the abuse of discretion standard

to be applied on those occasions when the Trial Judge and the jury concurred in the verdict. Specifically, the *Taylor* case held:

> It is by now standard doctrine that such orders may be reviewed for abuse of discretion, even when based upon such broad grounds as the trial judge's conclusion that the verdict was excessive or was against the weight of the evidence. There has been much discussion of the content which should be given to the elusive "abuse of discretion," with the weight of learning against appellant reversal except in relatively rare cases.
>
> This learning has largely arisen from consideration of cases in which motions for new trial - especially on the ground of excessive verdict - have been denied. Two factors unite to favor very restricted review of such orders. The first of these is the deference due the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather

> than upon a cold record. The second factor is the deference properly given to the jury's determination of such matters of fact as the weight of the evidence and the quantum of damages. This second factor is further weighted by the constitutional allocation to the jury of questions of fact.
>
> Where the jury finds a particular quantum of damages and the trial judge refuses to disturb its finding on the motion for a new trial, the two factors press in the same direction, and **an Appellate Court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial.**

Id. at 1045.

Comparing the abuse of discretion standards applied in the *Gorsalitz* case to the case at bar, Boburka notes several important conflicts. First, the Court of Appeals for the Fifth Circuit and the D.C. Circuit take the position that a jury verdict

concurred in by the Trial Judge can only be overturned on appeal when the verdict is contrary to all reason! Yet, in this case, the Sixth Circuit takes the position that it can overturn a jury verdict concurred in by the Trial Judge upon a "...definite and firm conviction that the Trial Court committed a clear error of judgment". Clearly, the Sixth Circuit standard is much lower than that of the Fifth Circuit and the D.C. Circuit. Further, the case of *Logan v. Dayton Hudson Corporation*, 865 F.2d 789 (Sixth Circuit 1989), from which this panel of the Sixth Circuit took its definition of the abuse of discretion standard, is a case in which the District Court had granted the Defendants a new trial on the issue of damages based upon the District Court's

determination that it had committed error in allowing the testimony of a chiropractor regarding the Plaintiff's potential need for surgery when the chiropractor was not qualified to give such an opinion. In *Logan*, the jury and the Judge did not concur so that the abuse of discretion standard was and should be lower. However, where the jury and the Trial Judge concur in a verdict, as here, then a higher standard of abuse of discretion (ie. "contrary to all reason") must be applied to reverse the Trial Court's denial of a directed verdict, or a motion for judgment notwithstanding the verdict, or in the alternative for a new trial or remittitur.

Boburka submits that this Court should grant certiorari in this cause to resolve this conflict

between the Courts of Appeal as to the applicable abuse of discretion standard to be applied where Trial Judge and jury concur in a verdict!

Additionally, the Sixth Circuit did not specifically detail the grounds on which the Trial Judge allegedly had abused his discretion in failing to grant Adcock a directed verdict. The Sixth Circuit merely held:

> Under the traditional principles, Dr. Tew's testimony, which was the only significant evidence on the issue of causation, was insufficient to demonstrate that it was more likely than not that Dr. Adcock's negligence caused the increased damage to Boburka's heart. We conclude, as a matter of law, that it was not, and that Dr. Adcock was entitled to a directed verdict.

(See Sixth Circuit Opinion at page 37)

From the foregoing conclusion, it is clear that the Sixth Circuit did not determine that the Trial Court had abused its discretion in not directing a verdict for Adcock, but, instead, reweighed the evidence and simply felt that the testimony "more likely than not" standard was insufficient to demonstrate causation. That is **not** an abuse of discretion finding, but, in fact, constitutes an invasion of the province of the jury and the Trial Judge in making a determination as to the weight of the testimony as opposed to whether the Trial Judge abused his discretion!

Thus, Boburka submits that the Sixth Circuit failed to properly define the abuse of discretion standard, and failed to apply the standard it had

defined in this case, thereby denying Boburka his right to a trial by jury. Accordingly, Boburka submits that in the interest of justice, to preserve the uniformity of the laws in this country, to properly define the abuse of discretion standard and to affirm the right to a trial by jury, this Court should accept certiorari in this cause.

II. Inexplicable Actions Requiring Oversight

In its Opinion, the Sixth Circuit was somewhat troubled by a recent Tennessee decision from the Tennessee Court of Appeals, *Kilpatrick v. Bryant* No.53, 1990 Tennessee Appeals LEXIS 785 (Tennessee Court of Appeals, November 1, 1990). However, the Sixth Circuit was able to avoid the *Kilpatrick* case by noting that the *Kilpatrick* case

had not been appealed to the Tennessee Supreme Court, and there was no indication that the Tennessee Supreme Court would adopt the troubling language in *Kilpatrick*. (See Opinion of Sixth Circuit, page 14, footnote 3.)

The Sixth Circuit was mistaken! The Plaintiff/Appellants in *Kilpatrick* petitioned for certiorari to the Supreme Court of Tennessee, which granted the Petition on July 29, 1991. The case is now docketed as cause number Shelby Law, 02501-9107-CV-00027, in the Supreme Court of Tennessee. Oral argument was presented in November, 1991, but no decision had been rendered as of January 11, 1993, the date the Sixth Circuit denied Boburka's Petition for Rehearing.

In his Petition for Rehearing, Boburka noted that, since the Sixth Circuit felt that *Kilpatrick* might be determinative of the causation issue which so troubled it, its decision should be stayed pending the outcome of the *Kilpatrick* case in the Supreme Court of Tennessee.

Alternatively, Boburka suggested in his Petition for Rehearing that the Court should certify the question to the Tennessee Supreme Court under Rule 23 of the *Rules of the Supreme Court of Tennessee*, which provides the means of certification of troubling questions.

Remarkably, the Sixth Circuit refused to grant Boburka's Petition for Rehearing to, at least, correct the Opinion in which the it had stated that

the *Kilpatrick* case had not been appealed to the Tennessee Supreme Court. (It is noteworthy that the Sixth Circuit had recommended its erroneous Opinion for full text publication), or to either stay its decision or to certify the question to the Tennessee Supreme Court to obtain the guidance which it felt was lacking in reaching this decision (See Sixth Circuit Opinion at page 14). Instead, the Sixth Circuit simply denied Boburka's Petition for Rehearing and left matters to stand as they were. The Sixth Circuit is recommending full text publication of an Opinion with an error on its face.

But perhaps, more importantly, the Sixth Circuit is ignoring an opportunity to allow the Tennessee Supreme Court to construe its own law

as to the causation under the circumstances here involved. That is, the Sixth Circuit refuses to either stay its decision or to certify the question which is admittedly troubling it and for which it has insufficient guidance to the Tennessee Supreme Court. That position of the Sixth Circuit is clearly contrary to the admonitions of this Court as set forth in *Clay v. Sun Insurance Office, Limited*, 363 U.S.207, 80 Sup.Ct. 1222, involving an action on an insurance policy wherein federal jurisdiction was predicated under diversity of citizenship. The United States Court of Appeals for the Fifth Circuit reversed the judgment for the Plaintiff and, on certiorari, this Court held that the Fifth Circuit should have certified the question to the Florida

Supreme Court. In that case, the Fifth Circuit had indicated that it could not, on the available materials, make a confident guess as to how the Florida Supreme Court would construe its statute as to a conflict-of-laws issue. Rather than making such a determination, the Fifth Circuit simply decided a constitutional question and avoided the conflict of law issues. This Court, in reversing, held that the Fifth Circuit should have certified the questions of local law to the Florida Supreme Court.

Applying the *Clay* case herein, Boburka notes that, in this case the Sixth Circuit likewise admits to "lacking guidance" as to what constitutes sufficient causation under Tennessee Law and

further, being somewhat troubled by a Tennessee Court of Appeals case, which is now in the hands of the Tennessee Supreme Court for decision. Yet, in spite of this, the Sixth Circuit lurches forward, without guidance, steadfastly refusing to await a decision by the Tennessee Supreme Court in *Kilpatrick* or certify the question to the Tennessee Supreme Court. That is clearly contrary to the admonitions of this Court in *Clay*.

Accordingly, Boburka submits that the Sixth Circuit in refusing to correct an opinion with a factual error on its face and, in refusing to certify a question to the highest court of a state when it is admittedly without guidance, or to at least await the decision of the Tennessee Supreme Court in a case

that it found troubling, is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise for this Court's power of supervision.

Wherefore, Premises Considered, Boburka respectfully submits that this Court should accept certiorari in order to exercise its power of supervision over this cause involving such inexplicable actions by the United States Court of Appeals for the Sixth Circuit.

III. Failure To Follow The Erie Doctrine

In this case, the United States Court of Appeals for the Sixth Circuit acknowledged that it was "...bound by State Law with regard to sufficiency of the evidence" (See Opinion of Sixth

Circuit at page 6). However, the Sixth Circuit failed to follow this rule. In failing to follow this rule, it violated the doctrines set forth by this Court and *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) and its progeny.

More specifically, Boburka cited to the Sixth Circuit the case of *Truan v. Smith*, 578 S.W.2d 73 (Tenn. 1979), a relatively recent decision by the Tennessee Supreme Court in which the Tennessee Supreme Court specifically set forth the standard of review in a case involving a medical malpractice judgment based on a jury verdict. In *Truan*, the Tennessee Supreme Court stated:

> In reviewing a case where the judgment is based on the jury's verdict, **we do not weigh the evidence nor determine the preponderance**

> **thereof**, nor do we decide the credibility of witnesses. *McAmis v. Carlisle*, 42 Tenn. App. 195, 300 S.W.2d 59 (1956). Our review is limited to a determination of whether there is any material evidence to support the verdict, and "it [our review] must be governed by the rule, safe guarding the constitutional right of trial by jury, which requires us to take the strongest legitimate view of all of the evidence to uphold the verdict, to assume the truth of all that tends to support it, to disregard all to the contrary, and to allow reasonable inferences to sustain the verdict." *D.M. Rose and Company v. Snyder*, 185 Tenn. 499, 206 S.W.2d 897 (1947). **If there is material evidence to support the verdict, we are required to affirm it.** *City of Chattanooga v. Ballew*, 49 Tenn. App. 310, 354 S.W.2d 806 (1961), and numerous cases there cited.

Id. at p. 74 (emphasis added)

That is, in each case, the Court on appeal, when considering the issue of sufficiency of the

evidence, **must affirm the verdict if there is material evidence** to support the jury verdict, **regardless of its weight, preponderance or credibility**. In *Truan*, the Tennessee Supreme Court held that the following material evidence supported causation:

> There was also a consensus among the physicians that testified that the earlier cancer was treated the better the prognosis of the patient, and that the patient's **chances** for survival declined drastically on the metastasis of the cancer. This, of course, places a premium on early and correct diagnosis and treatment of cancer in a patient.
>
> ... finally, there was medical testimony that metastasis had not occurred on May 6, 1974, and that, had the cancer been treated before that date, **Mrs. Smith's chances of either remission or recovery would have materially increased**. We think that the jury could reasonably conclude that, in

> failing to detect the breast mass when he had an opportunity to do so on both November 12, 1973 and March 25, 1974, and in failing to act on the patient's complaints on March 25, 1974, Dr. Truan did not exercise that degree of care and diligence required of him in providing medical care to Mrs. Smith, and that this lapse either materially increased the chances of or accelerated Mrs. Smith's death.

Id. at p. 74. (emphasis added)

The Tennessee Supreme Court held that this was sufficient material evidence to affirm the jury's verdict.

Boburka submits that this Court clearly erred when it made a determination that the evidence was insufficient under the "more likely than not" standard, in effect, substituting its judgment for that of the Trial Judge and jury. This is completely

contrary to the proper standard for review of factual issues on appeal. The proper standard of the United States Court of Appeals for the Sixth Circuit, in diversity cases, is to follow the Tennessee standard.

Additional support for this position is found in the more recent case of *Grissom v. Metropolitan Government of Nashville, Davidson County, Tennessee*, 817 S.W.2d 679 (Tenn. App. 1991) in which the Court stated:

> Appellate courts do not have the same ability to reconcile conflicting testimony or to evaluate credibility because they do not have the opportunity to observe the witnesses while they are testifying. See *Cumberland Tel. & Tel. Co. v. Smithwick*, 112 Tenn. 463, 468-69, 79 S.W. 803, 804 (1904); *Tennessee Coal and Railroad Co. v. Roddy*, 85 Tenn.

> 400, 403, 5 S.W. 286, 288 (1887). **Accordingly, we do not reweigh the evidence and we do not reevaluate the witnesses' credibility on appeal from a jury verdict.** *Truan v. Smith*, **578 S.W.2d 73, 74 (Tenn. 1979). Instead we give the jury verdict great weight,** *Karas v. Thorne*, 531 S.W.2d 315, 317 (Tenn. Ct. App. 1975), **and we will not set a verdict aside unless there is no material evidence to support it.** Tenn. R. App. P. 13(d); *Electric Power Bd. v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn.1985); *Cary v. Arrowsmith*, 777 S.W.2d 8, 23 (Tenn. Ct. App. 1989).

Id. at 684 (emphasis added)

And since the Court has acknowledged that it is bound by state law with regard to reviewing the sufficiency of the evidence, that same rule must be applied to the case at bar. *Gold v. National Savings Bank*, 641 F.2d 430, 434 (6th. Circuit),

cert. denied, 454 U.S. 826 (1981).

Applying the Tennessee standard of review to the case at bar, Boburka submits that there is material and sufficient evidence to support the verdict on the issue of causation in this case. In particular, Boburka submits that the Court failed to consider all of the relevant evidence which would support the jury's finding of causation in this matter. Boburka submits that the Court should have considered the following evidence in this case. First, the Court should also have considered the following testimony of Dr. Tew as to how well Boburka was doing:

> Q. Well and doing well?
>
> A. No sir, he's not. He has to take a lot of medicine and has to take them

several times a day. His endurance is about two thirds (2/3) of what it should be. He looks to rest usually mid day, early afternoon because of fatigue due to the impairment of his heart performance and loss of heart reserve.

And his longevity is significantly reduced. The major determinant of longevity in a heart patient is what your heart function is.

Q. Are you saying that is related to a heart attack?

A. Yes.

Q. Or to the surgery?

A. To the heart attack.

Q. And whenever that heart attack occurred?

A. Yes, sir.

In other words, taken together with his prior testimony about Boburka having an excellent

chance of being managed and having a significant reduction in the amount of heart injury if he had been hospitalized on the 18th rather than on the 24th, Dr. Tew is specifically stating that Dr. Adcock's negligence in failing to treat Boburka on August 18th was the proximate cause of the increased damage suffered by Boburka over the next six days resulting in congestive heart failure on August 24, 1984.

And there is yet additional evidence to support the finding of causation in this case. In particular, the evidence shows that Boburka testified that he continued to feel badly after his heart attack on the 18th until the 24th "like he had the flu". The evidence further showed that Dr.

Adcock admits that, on August 24th, Boburka was in congestive heart failure and close to death. The evidence further showed that on that day another emergency medical physician began treating Boburka with a variety of treatment including intermittent positive pressure breathing, bronkosol, nitrostat (which is nitroglycerin manufactured in a patch form), nitro ointment (another form of nitroglycerine), morphine sulphate, aminophylline and rotating tourniquets. Further, the evidence showed that the treatment was so effective that the next day the physician who examined Boburka was surprised at his quick recovery to the extent that the doctor noted that Boburka was sitting up in bed reading a novel (surprise was evident in the manner

in which the physician wrote the word NOVEL!!, being all in caps and followed by two exclamation points) after being near death on the day before. In other words, Boburka, by the 25th of August, was stabilized. Thus, Boburka submits that, from the foregoing evidence, the jury believed that, had Adcock properly treated Boburka on August 18th, he would not have suffered the additional loss of heart function or the congestive heart failure he endured on August 24th. The jury believed that, had Boburka been treated on the 18th, he would have been feeling well enough to read his novel on the 19th of August instead of continuing to feel "lousy" until he suffered the congestive heart failure from which he was saved using normal treatments

available for heart attack victims in 1984.

Boburka submits that the foregoing material evidence gleaned from the undisputed record of the treatment of Boburka and his own testimony, together with Dr. Tew's testimony, constitutes material evidence sufficient to support the jury verdict on the issue of causation on appeal and must, pursuant to the Tennessee standard of review on appeal, be affirmed!

The United States Court of Appeals for the Sixth Circuit refused to follow Tennessee Law as to what constitutes sufficient evidence to uphold a verdict on appeal in a medical malpractice action. Instead, the Sixth Circuit admittedly reweighed the evidence and decided, contrary to the Trial Judge and jury, that Dr. Tew's evidence was insufficient

to demonstrate that it was more likely than not that Dr. Adcock's negligence caused the damage to Boburka's heart. Reweighing of the evidence clearly violates the Tennessee Supreme Court standard of review on the sufficiency of the evidence and, thus, also the requirement of this Court that United States Courts of Appeal must follow State Law in determining the sufficiency of the evidence in diversity cases. Indeed, the Sixth Circuit in the case of *Clutter v. Johns-Manville Sales Corporation*, 646 F.2d 1151 (Sixth Circuit, 1981) stated:

> A Federal Court sitting in diversity must apply the law of the state's highest court. If the highest court has not spoken, the federal court must ascertain from all available data what the state law is and apply it. If the state appellate court announces a principle and relies on it, that is a

> datum not to be disregarded by the Federal Court unless that it is convinced by other persuasive data that the highest court of the state would decide otherwise. (Citations omitted) id. at 1153. (emphasis added)

In the case at bar, the Sixth Circuit has violated this rule in several respects. First, the Tennessee Supreme Court specifically spoke to the standard of review to be followed by the Court of Appeals with regard to sufficiency of the evidence in a diversity case. The Sixth Circuit ignored the Tennessee Supreme Court ruling by reweighing the evidence as well as determining the credibility of the witnesses.

Secondly, to the extent that the Tennessee Supreme Court had not spoken to the Loss of Chance Doctrine discussed at length by the Sixth Circuit, then the Sixth Circuit was required to

obtain from all available data what the state law is and apply it. The Sixth Circuit did not ascertain all available data, since it became aware that the *Kilpatrick* case was being decided by the Tennessee Supreme Court and, further, when it could have certified the troubling question to the Tennessee Supreme Court. Thus, it is clear from the Sixth Circuit's own Opinion that is has not followed the *Erie* case and its progeny.

As further support for his position, Boburka cites the case of *Moore v. Illinois Central Railroad Company*, 312 U.S. 630, 61 Sup.Ct. 754 (1941), in which this Court granted certiorari to review a judgment in which the United States Court of Appeals for the Fifth Circuit had applied a Mississippi Statute of Limitations contrary to the

Mississippi application of the same statute in the same case. In that case, Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against the Railroad Company in a Mississippi State Court, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the Railroad. The state Trial Court granted a Judgment on the pleadings against Moore. On appeal, the Mississippi Supreme Court reversed and remanded. One of the Railroad's pleas was that the contract of employment between Moore and the Railroad was verbal rather than written, and that any action thereon was barred by the three-year Statute of Limitations. With reference to that plea, the Mississippi Supreme Court held that the

Appellant's suit was not a verbal contract between him and Appellee, but a written contract made with the Appellee for Appellant's benefit by the Brotherhood of Railroad Trainmen.

After remand by the Mississippi Supreme Court, Moore amended his Complaint to ask for damages in excess of Three Thousand Dollars ($3,000.00). The Railroad, thereupon, removed the case to Federal Court. The United States District Court, considering itself bound by state law, held that the Mississippi three-year Statute of Limitations did not apply. On appeal, the United States Court of Appeals for the Fifth Circuit reversed, declining to follow the Mississippi Supreme Court's ruling. The Fifth Circuit noted that the Mississippi Supreme Court does not regard

itself as bound by a decision upon a second appeal and stated: "Since the removal of the case to the federal court, this Court stands in the place of the Supreme Court of Mississippi and with the same power of reconsideration".

In reversing the Fifth Circuit, this Court stated:

> But the Circuit Court of Appeals do not have the same power to reconsider interpretations of state law by State Courts as do the highest courts of the state in which a decision has been rendered. The Mississippi Supreme Court had the power to reconsider and overrule this former interpretation, but the Court below did not. And in the absence of a change by the Mississippi Legislature, the Court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of limitation only to the extent, if any, that examination of later opinions of the Mississippi Supreme Court show that it had changed its earlier interpretation of the

> effect of the Mississippi statute ....
> But the Court below did not rely upon any change brought about by the Mississippi Legislature or the Mississippi Supreme Court. On the contrary it concluded that it should reexamine the law because there was involved the interpretation and application of a collective contract of an Interstate Railroad with its employees.... But for failure to follow state law or the state statute of limitations, the judgment of the Circuit Court of Appeals is reversed; the judgment of the District Court is affirmed.

Id. at 755-756

Applying the foregoing cases to the case at bar, Boburka submits that the United States Court of Appeals for the Sixth Circuit did not have the power to depart from the ruling of the Tennessee Supreme Court in *Truan v. Smith*, which it obviously did.

Accordingly, Boburka submits that this Court

should accept certiorari in order to make certain that the United States Court of Appeals, which it admittedly acknowledges.

As additional support for this position, Boburka would cite the case of *Hardin v. Straub*, 109 Sup.Ct. 1998 (1989), in which a prisoner in a Michigan state prison filed a *pro se* Complaint pursuant 42 *U.S.C.* §1983. The District Court, *sua sponte*, dismissed the Complaint, because it had been filed after the expiration of Michigan's three-year statutory limitations period for personal injury actions. The Court of Appeals affirmed. However, Michigan had a tolling Statute, such that a person in prison at the time the claim accrues would have until one year after the disability is removed to bring an action even though the period of

limitations had already run under the usual limitations statute. The Sixth Circuit, confronted with the tolling statute, held that the Michigan Tolling Statute was inconsistent with federal law and declined to apply it.

This Court reversed holding that the Tolling Statute was not inconsistent with federal law.

Boburka submits that the United States Court of Appeals for the Sixth Circuit, by making a *de novo* determination of the weight and credibility of Dr. Tew's testimony on appeal, has invaded the province of the jury and effectively denied Boburka his right to trial by jury under the Seventh Amendment to the United States Constitution and pursuant to Article 1, Section 6 of the Constitution of the State of Tennessee. Specifically, the Seventh

Amendment states that a fact tried by a jury may not be reexamined by any court other than according to the Rules of Common Law. And of course, in this instance, the common law must be determined by the laws of the State of Tennessee, as interpreted by the Supreme Court of Tennessee. Thus, the applicable and controlling law for purposes of the review by the Sixth Circuit must be the statement by the Supreme Court of Tennessee in *Truan v. Smith, supra*, wherein the Tennessee Supreme Court states:

> In reviewing a case where the judgment is based on the jury's verdict, we do not weigh the evidence nor determine the preponderance thereof, nor do we decide the credibility of witnesses. (Citation omitted) Our review is limited to a determination of whether there is any material evidence to support the verdict and "it [our review] must be

> governed by the rule, safeguarding the constitutional right of trial by jury, which requires us to take the strongest legitimate view of all the evidence to uphold the verdict, to assume the truth of all that tends to support it, and to disregard all to the contrary, and to allow reasonable inferences to sustain the verdict. *D.M. Rose and Company v. Snyder*, 185 Tennessee 499, 206 S.W.2d 897 (1947). If there is material evidence to support the verdict, we are required to affirm it. (Citations omitted)

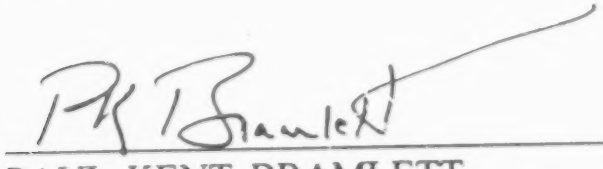
Id. at page 47 (Emphasis added)

Thus, it is clear that the Supreme Court of Tennessee has adopted the rule that it shall not reweigh the evidence found by a jury because that would be invading the province of the jury and, in effect, denying the parties to a right to a trial by a jury.

Wherefore, Premises Considered, the Petitioner, Theodore Thomas Boburka, respectfully

requests the Court to accept his Petition for Certiorari in order to resolve conflicts as to the abuse of discretion standard between the Circuits, to exercise its oversight responsibilities in order to require the Courts of Appeals to correct opinions with errors on their face, to require certification where necessary, and to make certain that the various Courts of Appeals follow the correct doctrine when applying State Law in diversity cases.

Respectfully Submitted,



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Recommended for Full-Text Publication
Pursuant to Sixth Circuit Rule 24

No. 91-6105

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Theodore T. Boburka,

Plaintiff-Appellee,

v.

Frank Adcock, M.D.,

Defendant-Appellant.

On Appeal from the United States District Court for the Western District of Tennessee

---

Decided and Filed November 9, 1992

Before: RYAN, BOGGS, and BATCHELDER, Circuit Judges.

RYAN, Circuit Judge. This is an appeal by the defendant physician from an adverse jury verdict in a medical malpractice action. Among a host of issues defendant raises on appeal, we shall address only one because it is dispositive:

> Whether there is sufficient competent evidence in the record to support the jury's finding of defendant's negligence, given the speculative nature of the testimony by the plaintiff's expert witness.

Before discussing this issue, however, we must address the plaintiff's threshold argument that the court is without jurisdiction to entertain this

appeal because the defendant's notice of appeal is inadequate.

For the reasons to be explained, we conclude that jurisdiction lies, and that the judgment for the plaintiff should be set aside because there is insufficient evidence on the issue of causation to support it.

I.

A.

In 1984, plaintiff Theodore T. Boburka was a 46-year-old Florida resident with a history of heart trouble. Boburka was a construction engineer and his job required him to travel to oversee projects. Boburka's physicians recommended that while traveling, he keep copies of his EKGs with

him and make contact with a physician in each location where he was assigned.

In July 1984, Boburka was assigned to Memphis, and his daughter Heather accompanied him to that city. While in Memphis, he had occasion to visit Dr. William Burrow, to whom he had been referred by a medical referral service. Boburka related to Dr. Burrow his history of heart trouble and described the medication he was presently taking. On August 15, 1984, while traveling, Boburka exerted himself by running through an airport and then lifting heavy luggage. He experienced severe pain. The next day, August 16, he again visited Dr. Burrow who performed an EKG and diagnosed muscle strain.

On the very early morning of August 18, Boburka woke up with severe pain and his daughter drove him to the Methodist Hospital South emergency room. A nurse took his vital signs, and he was examined by the defendant, Dr. Frank Adcock. Dr. Adcock's examination, according to Boburka, consisted of poking him on the left shoulder blade a few times. Dr. Adcock was told of Boburka's history of muscle strain and was advised that a recent EKG had been taken, but he did not order a new EKG or a chest x-ray. Dr. Adcock diagnosed Boburka's condition as muscle stain and prescribed a small dose of Demerol, a pain medication.

After returning home, Boburka continued to suffer severe pain. He returned to the hospital emergency room at 6:45 a.m. and was again seen by Dr. Adcock who gave Boburka another dose of the same pain medication. Boburka then returned home and fell asleep.

Later that sam day, Boburka visited Dr. Mellor, a physician in Dr. Borrow's clinic. Dr. Mellor received Boburka's history and diagnosed muscle strain, not a heart attack. Two days later, on August 20, Boburka visited Dr. Burrow, who also diagnosed muscle strain. On August 24, Boburka began suffering severe pain and had difficulty breathing. He returned to the Methodist Hospital South emergency room where he was seen

briefly by Dr. Adcock. After Boburka passed out, another physician completed the examination. Boburka was diagnosed as suffering from congestive heart failure and was sent to Methodist Hospital Central where, several days later, successful bypass surgery was performed. The surgery, however, did not alleviate the effect of the earlier heart attack which Boburka's expert testified had been occurring during Boburka's second visit to the emergency room on August 18, 1984, and which caused significant injury to Boburka's heart muscle. Trial testimony revealed that this injury significantly reduced Boburka's longevity and endurance.

B.

Boburka filed a complaint in federal court, claiming diversity jurisdiction. In due course, Dr. Adcock moved for summary judgment. Boburka filed no reply and the district court denied the motion.

Six months prior to trial, Dr. Adcock filed a motion in limine to exclude the testimony of Dr. Franklin T. Tew, a physician Boburka intended to call as an expert witness. The district court referred the motion to a magistrate judge who denied it. Dr. Adcock filed exceptions to the magistrate judge's order, but the district court permitted the ruling to stand, and the case proceeded to trial.

At the close of plaintiff's case, Dr. Adcock moved for a directed verdict. The motion was denied. After presenting his own case, Dr. Adcock again moved for a directed verdict and the motion was again denied. The district court then instructed the jury and provided it with a special verdict form. After several days of deliberation, which included a supplemental instruction, the jury returned a verdict for Boburka in the amount of $600,000.

Dr. Adcock moved for judgment notwithstanding the verdict or, in the alternative, for new trial or remittitur. The district court denied the motion. Dr. Adcock then moved to reconsider and the district court denied that motion. Dr.

Adcock appeals from the denial of these two motions.

II.

A.

Jurisdiction and Standard of Review

Boburka advances as a threshold issue the argument that this court lacks jurisdiction over Dr. Adcock's appeal because the notice of appeal did not specify that Dr. Adcock was appealing from the final judgment, but only that he was appealing from the denials of the motion for a JNOV or, alternatively, a new trial or remittitur, and the denial of the motion for reconsideration.

Dr. Adcock's notice of appeal specifies that he appeals from the denial of his two post-trial

motions. However, his brief before this court argues that the district court erred in failing to grant his motion for a directed verdict, as well as failing to grant his post-trial motions. Strictly construed, the notice of appeal does not preserve the denial of the directed verdict issue.

Nevertheless, Dr. Adcock's intent is clear. In *Peabody Coal Co. v. Locals 1734, 1508 & 1548*, 484 F.2d 78 (6th Cir. 1973), this court held that certain defects in a notice of appeal are not always fatal:

> The present case involves a motion to reconsider, which is in the nature of a Rule 59 motion to alter or amend judgment....
>
> > "This defect is not fatal where it can be reasonably inferred from the notice of

> appeal that the intent of the appellant was to appeal from the final judgment, if it also appears that the appellee has not been mislead." ....
>
> Peabody's contention that this Court lacks jurisdiction to consider the appeal because of the improper notation on the notice of appeal is without merit.

Id. at 81-82 (quoting *Lumbermen's Mutual Ins. Co. v. Massachusetts Bonding & Ins. Co.*, 310 F.2d 627, 629 (4th Cir. 1962)).

The Fifth Circuit recently concurred in this reasoning, noting that "every Circuit ... has treated an appeal from an order denying a motion for new trial as an appeal from the adverse judgment itself." *Osterberger v. Relocation Realty Serv. Corp.*, 921 F.2d 72, 73 (5th Cir. 1991). We conclude that Dr. Adcock's notice of appeal adequately preserved for

appeal all the issues he raises before this court. Therefore, we shall review the district court's denial of Dr. Adcock's trial motion for directed verdict and his post-trial motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

On a motion for judgment notwithstanding the verdict or for a directed verdict, the district court must determine whether there was sufficient evidence to raise a material issue of fact for the jury. *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991). The motion should be granted "'if there is a complete absence of pleading or proof on an issue or issues material to the cause of action....'" *Kitchen v. Chippewa Valley Schools*,

825 F.2d 1004, 1015 (6th Cir. 1987) (citation omitted). This court applies the same standard when reviewing trial court decisions. *Monette*, 929 F.2d at 280.

We review the trial court's grant or denial of a motion for a new trial for abuse of discretion, which is defined as a "'definite and firm conviction that the trial court committed a clear error of judgment.'" *Id.* (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989)).

B.

Sufficiency of the Evidence on Causation

Dr. Adcock argues that the testimony of plaintiff's expert, Dr. Tew, was mere speculation and does not establish sufficient evidence of a

casual nexus between Dr. Adcock's acts or omissions and Boburka's increased heart injury. After weighing the relevant Tennessee statute and case law, we agree.

When its jurisdiction is grounded in diversity, this court is bound by state law with regard to sufficiency of the evidence. *Gold v. National Sav. Bank*, 641 F.2d 430, 434 (6th Cir.), *cert. denied*, 454 U.S. 826 (1981). In Tennessee, the rule is that the appellate court must accept all the evidence for the prevailing party as true, and all reasonable inferences in the party's favor. "'However, it is also clear that under Tennessee law there must be substantial and material evidence from which the jury could have based a verdict for the prevailing

side.'" *Jarrett v. Epperly*, 896 F.2d 1013, 1017 (6th Cir. 1990) (quoting *Gold*, 641 F.2d at 434).

The theory of Boburka's case is that Dr. Adcock owed a duty of care to Boburka to examine him completely when he visited Dr. Adcock in the emergency room. When Dr. Adcock failed to hospitalize Boburka but only prescribed an injection for pain, Dr. Adcock breached that duty. While this breach did not cause Boburka's heart attack, the argument continues, the breach did cause greater damage to Boburka's heart; damage that would not otherwise have resulted had Dr. Adcock rendered proper treatment. Boburka argues that the increased injury to his heart resulted in

compensable damages for emotional distress, physical distress, and loss of enjoyment of life.

Dr. Adcock attacks the testimony of Dr. Tew, plaintiff's expert, as being too speculative to constitute any evidence of causation. Dr. Tew began treating Boburka in October 1984, more than a month after Boburka's heart attack. A careful examination of the trial transcript reveals that the only testimony by Dr. Tew relating to causation is the following passage:

> [Q.] Do you have an opinion based upon your medical education, experience and training, and to a reasonable degree of medical probability as to whether or not any damages sustained by Mr. Boburka would have been prevented had he received treatment, such as hospitalization and a complete cardiac work-up on the 18th day of August, 1984?

> [A.] Obviously one cannot state with absolute certainty whether an outcome would have been different or not if the patient had been hospitalized on the 18th. But given the tools and the treatment that's (sic) we have nowadays, including 1984, the patient certainly had an *excellent chance* of being much better managed with a *significant chance* of reducing the amount of heart injury if he had been hospitalized on the 18th rather than on the 24th.
>
> ....
>
> ... I'm talking about a reduced amount of heart muscle injury with prompt, more aggressive treatment. There are things that one can do in 1984 and today, if you do them early enough you can reduce or prevent heart muscle injury.

In a special interrogatory, the jury found that the "negligence on the part of Dr. adcock proximately

contribute(d) to the severity of the heart condition suffered by Mr. Boburka August 24, 1984...."

In denying Dr. Adcock's post-trial motion, the district court did not evaluate the sufficiency of Dr. Tew's testimony. Instead, the court held: "The jury verdict, in the Court's judgment, is not based upon speculative evidence. The discriminating manner in which the jury answered the special interrogatories submitted to them reflects this argument."

A tennessee statute establishes the elements a plaintiff must prove in a medical malpractice action. It provides, in relevant part:

> In a malpractice action, the claimant shall have the burden of proof...:

> (1) The recognized standard of acceptable professional practice....
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Tenn. Code Ann. § 29-26-115(a).

The Tennessee Supreme Court has held that this provision "essentially codifies the common law elements of negligence without substantive modification." *Cardwell v. Bechtol*, 724 S.W.2d 739, 753 (Tenn. 1987). Because this portion of the statute effects no modification of the law of

causation,[1] we shall consider cases that have addressed causation in the medical malpractice context and in other negligence contexts.

In *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 862 (Tenn. 1985), the Tennessee Supreme Court discussed extensively the type of evidence necessary to demonstrate proximate cause. There the court considered testimony from the plaintiff's expert as to whether, if the defendant had not been negligent in seeking medical assistance, the decedent would have survived. The expert testified that the decedent's survival "'is something that we

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[1]We note that another section of the same statute modifies the law by imposing more rigorous procedural requirements on the plaintiff, such as requiring that a testifying expert must be licensed in Tennessee or a bordering state. Tenn. Code Ann. § 29-26-115(b).

can only speculate in. I have seen patients come in like this and be able to--to help them, and sometimes they've recovered.'" *Id.* at 861. The court held this testimony was insufficient to prove proximate cause. Drawing from numerous other sources, it noted:

> "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that *it is more likely than not* that the conduct of the defendant was a cause in fact of the result." ....
>
> "The *mere possibility* of a causal relationship, without more, is insufficient to qualify as an admissible expert opinion."

Id. at 861, 862 (emphasis added) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 41, at 269 (5th ed. 1984); and *Kirschner v. Broadhard*, 671 F.2d 1034, 1039 (7th Cir. 1982)).

This court relied on *Lindsey* and other Tennessee Supreme Court decisions in *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). This court considered the requisite degree of medical certitude necessary to establish a causal link between the defendant's negligence and the plaintiffs' injuries, holding:

> Whereas numerous jurisdiction have rejected medical experts' conclusions based upon a "probability," a "likelihood, " and an opinion that something is "more likely than not" as insufficient medical proof, the Tennessee courts have adopted a far less stringent standard of proof and have required only that the plaintiffs prove a causal connection between their injuries and the defendant's tortious conduct by a preponderance of the evidence. While, in accordance with Tennessee common law, plaintiffs' proof by a reasonable medical certainty requires them only to

> establish that their particular injuries *more likely than not* were caused by ingesting the contaminated water, their proofs may be neither speculative nor conjectural.

Id. at 1201 (emphasis added).

The court continued, specifically noting the kind of testimony that falls below the required standard:

> Medical testimony that ingesting the contaminated water "possibly," "may have," "might have," or "could have" caused the plaintiffs' presently ascertainable or anticipated injuries does not constitute the same level of proof as a conclusion by a reasonable medical certainty.

Id.

Construing the Tennessee malpractice statute in light of the foregoing cases, we conclude that the plaintiff was required to prove that it is more likely than not that defendant's negligence cause plaintiff

to suffer injuries which would not otherwise have occurred. Applied to this case, Dr. Tew's testimony, that but for Dr. Adcock's negligence in not hospitalizing Boburka on August 18, Boburka had a "significant chance" of avoiding increased heart injury, fails to meet the requisite standard to prove causation. Although Tennessee law requires this court to draw a fine line between sufficient and insufficient proof of causation, we believe that a "significant chance" rather plainly falls below the "more likely than not" standard. Rather, testimony in this case concerning a "significant chance" is comparable to testimony about a "mere possibility," rejected by the Tennessee Supreme Court in *Lindsey* as insufficient to prove proximate cause.

In an attempt to salvage some value from Dr. Tew's testimony, Boburka urges this court to permit recovery for the "loss of chance" of reduced heart muscle injury. Boburka relies on a doctrine known as loss of chance causation, adopted in some jurisdictions. This theory allows a medical malpractice plaintiff to recover if he produces evidence that the defendant physician's malpractice reduced the patient's chances for a better outcome, even if the chance of the better outcome without the physician's negligence was less than fifty percent.[2] Courts that have adopted this view "are

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[2]For example, in *Herskovits v. Group Health Cooperative*, 99 Wash. 2d 609, 664 P.2d 474 (Wash. 1983), the Washington Supreme Court held that the reduction of a patient's chance for survival from thirty-nine percent to twenty-five percent due to a negligent failure to diagnose his cancer was sufficient proof of causation for the

united in their rejection of the requirement that there be testimony that the patient had an above-50-percent chance of a better result absent malpractice." John D. Hodson, Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R. 4th 19 (1987). A review of Tennessee medical malpractice decisions reveals that it is not entirely clear whether Tennessee has adopted this doctrine.

The most factually analogous case to the present case is *Watkins v. Russell*, 564 S.W.2d 367 (Tenn, Ct. App.), *cert. denied, id.* (Tenn. 1976). Plaintiff in that case claimed that the defendant's failure to hospitalize plaintiff's decedent

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case to go to a jury. *See also Jeanes v. Milner*, 428 F.2d 598 (8th Cir. 1970) (construing Arkansas law).

immediately when decedent initially visited defendant's office constituted negligence and resulted in the patient's fatal heart attack later that day. Plaintiff relied on the deposition of a single physician. When asked the question whether immediate hospitalization would have increased decedent's chances of survival, the physician replied that "there is some possibility that it would have made a difference...." *Id.* at 369. The trial court directed a verdict for defendant, and the appellate court affirmed, holding: "The small possibility of survival admitted by [plaintiff's physician] precludes a finding by the jury that [defendant's] negligence was a proximate cause of

death." *Id.* This seems to foreclose recovery for the loss of chance of survival.

The Tennessee Supreme Court's later decision in *Truan v. Smith*, 578 S.W.2d 73 (Tenn. 1979), contains language, however, that may be read as opening the possibility that "loss of chance" may be a basis for recovery in Tennessee. In *Truan*, the court upheld a jury verdict in a medical malpractice case. In an opinion on a petition to rehear, the court noted that it was presented with the issue of whether "the record contain[ed] evidence of malpractice on the part of petitioner which proximately caused or accelerated the death of [respondent]." *Id.* at 77. The court reiterated its original holding that evidence supported "the jury's

finding that [petitioner] did not exercise that degree of care and diligence required of him in providing medical care to [respondent] and that his failure to do so either *materially increased the chances of* or accelerated [respondent's] death." *Id.* (emphasis added).

This language from *Truan* is somewhat ambiguous and lends itself to two interpretations. One interpretation would seem to permit a medical malpractice plaintiff to recover for the loss of chance, since allowing recovery for negligence that "materially increased the chances of " death is the converse of allowing recovery for negligence that resulted in a "loss of chance" for recovery. Under this interpretation of *Truan*, the Tennessee Supreme

Court would have established a new standard for proximate cause. The second, narrower interpretation is that the *Truan* court did not intend to depart from Tennessee's traditional "more likely than not" principle of proximate cause but merely used the phrase "materially increased the chances of" as a shorthand way to apply traditional standard to the case before it.

We think the second, narrower interpretation is sounder. We believe it unlikely that the Tennessee Supreme Court would depart from traditional proximate cause principles without a full explanation or citation of authority. We also note that in a decision released only two months before *Truan*, the court reaffirmed its acceptance of the

reasonable medical certainty standard of proximate cause. *Owens Illinois, Inc. v. Lane*, 576 S.W.2d 348, 349-50 (Tenn. 1978).

We are fortified in this view because a subsequent decision from the Tennessee Court of Appeals interpreted *Truan* narrowly. In *Alessio v. Crook*, 633 S.W.2d 770 (Tenn. Ct. App.), *appeal denied, id.* (Tenn. 1982), the plaintiff claimed that the defendant had negligently failed to discover, diagnose, and treat cancer in the plaintiff's lung. The plaintiff sought a jury instruction based on a liberal reading of *Truan*. The requested instruction stated that the defendant's negligence would constitute proximate cause if the negligence "materially increased the chances of [plaintiff]

having to lose his entire right lung rather than a portion thereof...." *Id.* at 774-75. The trial court rejected this instruction, and instead instructed the jury that the defendant's negligence would constitute proximate cause if it "caused [plaintiff] to lose his entire right lung, rather than a portion thereof...." *Id.* at 775. The approved instruction would not permit recovery based merely on the loss of the chance that plaintiff's entire lung could have been saved. The appellate court affirmed, concluding that *Truan* did not support plaintiff's instruction and that the trial court properly instructed the jury as required by Tenn. Code Ann. § 29-26-115(a)(3). *Id.* at 776. The Tennessee

Supreme Court denied permission to appeal. *Id.* at 770.[3]

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[3]One commentator, after reviewing both *Truan* and *Alessio*, concluded that Tennessee does not recognize the loss of chance doctrine. Note, *Loss of Chance in Medical Malpractice Cases: A Contra View With an Examination of Tennessee's Current Position*, 20 Mem. St. U.L. Rev. 81, 109 (1989).

> We are somewhat troubled by a recent Tennessee decision discussing medical malpractice causation issues, an unpublished opinion from the Tennessee Court of Appeals, *Kilpatrick v. Bryant*, No. 53, 1990 Tenn. App. LEXIS 785 (Tenn. Ct. App. Nov. 1, 1990). The *Kilpatrick* court reviewed *Truan* and *Alessio*, and held that "it appears that Tennessee does not recognize that there can be recovery for loss of a better chance or an increase in a risk of harm. However, we find nothing in these two cases that would change the established rules concerning proof of proximate cause." *Id.*, slip op. at 5. This conclusion is puzzling because if, in fact, *Truan* and *Alessio* did not change the established rules relating to proximate cause, then the law would *not* permit recovery for the loss of a better chance.
>
> In any event, the result in *Kilpatrick* accords with traditional principles of proximate cause. The court considered testimony "based on a

This review of Tennessee authority leaves us with the impressions that Tennessee has not affirmatively adopted the loss of chance doctrine. Lacking such guidance, we shall rely on the traditional rule of proximate causation, as articulated in *Lindsey*. We do not give *Truan* the liberal reading urged by Boburka, and instead read

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reasonable degree of medical certainty, that the delay of four (4) months in the operation performed increased the likelihood of [plaintiff] suffering irreparable damage." *Id.* at 3. The court held that this testimony did "not rise to the level required by the statute and fail[ed] to establish that the plaintiff 'suffered injuries which would not otherwise have occurred' due to the defendant's negligence." *Id.* at 7 (quoting Tenn. Code Ann. § 29-26-115(a)(3)).

We note that the parties in *Kilpatrick* did not seek review by the Tennessee Supreme Court, and thus there is no indication that the Tennessee Supreme Court would adopt the dicta' in *Kilpatrick* about loss of chance.

Truan as affirming traditional principles of proximate cause. Therefore, *Truan* provides no support for the contention that Dr. Tew's testimony sufficiently proved proximate cause. Even after *Truan*, a plaintiff, under Tennessee law, must introduce proof that it is more likely than not that absent the physician's malpractice, the patient would not have suffered the complained of damages. Dr. Tew's testimony, that if Dr. Adcock had hospitalized Boburka on August 18 Boburka would have had a "significant chance" of reduced heart injury, is insufficient.

We conclude that Tennessee has not adopted the loss of chance theory of proximate cause in medical malpractice cases but instead continues to

follow traditional proximate cause principles. Under the traditional principles, Dr. Tew's testimony, which was the only significant evidence on the issue of causation, was insufficient to demonstrate that it was more likely than not that Dr. Adcock's negligence cause the increased damage to Boburka's heart. We conclude, as a matter of law, that it was not, and that Dr. Adcock was entitled to a directed verdict.

III.

REVERSED and **REMANDED** for entry of a judgment for the defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

THEODORE THOMAS BOBURKA,	*	
	*	
Plaintiff,	*	
	*	
v.	*	No. 88-2089 HB
	*	
FRANK ADCOCK, M.D.,	*	
	*	
Defendant.	*	

ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

On May 31, 1989, defendant Frank Adcock, M.D., filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. Dr. Adcock contends there is no

genuine issue as to any material fact upon which liability attributed to him can be predicated, and that he is entitled to a judgment as a matter of law. Plaintiff did not file a response to the defendant's motion for summary judgment.

After careful consideration, the Court finds the defendant's motion for summary judgment should be denied.

Background

On February 9, 1988, plaintiff Theodore Thomas Boburka initiated this lawsuit against defendant Frank Adcock, M.D., a Tennessee licensed emergency room physician practicing at Methodist Hospital South (hereinafter Methodist South) in Memphis, Tennessee. Plaintiff claims

that on or about August 18, 1984, at approximately 2:00 a.m., he went to the Methodist South emergency room complaining of back pain, and was directed to be treated by the defendant Dr. Adcock. Plaintiff claims at that time, he was suffering from back pain and having trouble breathing. Plaintiff alleges that Dr. Adcock was notified of his pre-existing heart condition and Dr. Adcock was offered an envelope containing copies of plaintiff's prior EKGs. Plaintiff asserts these medical records were offered to aid and assist Dr. Adcock in the formulation of a diagnosis and treatment program for the plaintiff. Plaintiff alleges that Dr. Adcock performed a cursory physical examination and did not review plaintiff's EKGs.

Plaintiff claims Dr. Adcock made a diagnosis of "probable muscular strain with scapular strain" and ordered plaintiff be treated with an intra-muscular injection of 25 milligrams of Demerol with 25 milligrams of phenergan at approximately 2:15 a.m. and discharged him.

Later, on the same day at approximately 6:45 a.m. plaintiff claims Dr. Adcock treated him again with 25 milligrams of Demerol and 25 milligrams of phenergan and discharged him. Plaintiff claims upon second visit to the hospital Dr. Adcock told him he would call the authorities if plaintiff should come back to the hospital again.

Subsequently, on August 24, 1984, at approximately 6:30 a.m. plaintiff was taken to

Methodist South with complaints of severe back pain and breathing problems. Plaintiff claims Dr. Adcock chastised him as to his warning of what would happen should be return to the hospital. At that time plaintiff claims Dr. Adcock informed him that his work period was ending and another physician would take over his care. Plaintiff claims the other attending physician diagnosed his condition and he was immediately removed to Methodist Central Hospital, where he later underwent open heart surgery (coronary by-pass operation). Plaintiff claims Dr. Adcock's negligent diagnosis and treatment caused him to suffer further progression of his disease process and caused him to receive irreparable harm and damage to his

cardiovascular system. Plaintiff claims he has further suffered anxiety, injury and stress of both a psychological and a physical nature along with psychological, physical and mental anguish and pain resulting from the progressive heart condition which developed in the absence of medical treatment by Dr. Adcock.

Specifically, plaintiff seeks one million dollars ($1,000,000) in compensatory damages for the alleged injuries he sustained.

Defendant, Frank Adcock, M.D., denies that plaintiff complained of breathing trouble, and notified him of plaintiff's pre-existing heart condition. Defendant contends he administered the acceptable practices, treatments and procedures as

appropriate for the physical condition of the plaintiff. Defendant further contends he used, possessed and exercised that degree of skill and learning ordinarily used possessed and exercised by members of his profession in good standing and in similar practice in his community.

On May 31, 1989, defendant filed a motion for summary judgment asserting there is no genuine issue as to any material fact.

Plaintiff did not respond to the defendant's motion.

Law and Conclusion

Under Rule 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show together there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corporation v. Catrett, 106 S.Ct. 2548, 2552 (1986). Motions for summary judgment further, require the Court to view the complaint in the light most favorable to the plaintiff. Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975). If there is not a genuine issue of material fact and the movant is entitled to judgment as a matter of law, summary judgment is appropriate. 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, Section 2727, p. 121 (2d Ed. 1983).

Rule 56(e) of the Federal Rules of Civil Procedure requires that a nonmoving party present affidavits or other documents to counter proof submitted by the moving party in order to create a material issue of fact. Celotex Corp. v. Catrett, 106 S.Ct. at 2553.

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986).

Expert testimony is required to establish negligence and proximate cause in malpractice actions unless the alleged malpractice is within the

common knowledge of laymen. Phelphs v. Vanderbilt University, 520 S.W.2d 353 (Tenn, App. 1974). In medical malpractice cases, only the most obvious form of negligence may be established without expert testimony. Tucker v. Metro. Gov. of Nashville & Davidson, 686 S.W.2d 87, 92 (Tenn. App. 1984).

In Bowman v. Henard, 547 S.W. 2d 527 (Tenn. 1977), the Supreme Court of Tennessee held that while motions for summary judgment are generally inappropriate in professional malpractice cases, [however] if the only issue is one which requires expert testimony and there is no expert response to an affidavit by an expert, then summary judgment is proper. Id. at 530.

The Common Knowledge exception is applicable only in "exceptional cases". German v. Nichopoulus, 577 S.W.2d 197 (Tenn. App. 1978). In German, the Court stated that for the Common Knowledge exception to apply, "medical negligence [should be] as plain as a fly floating in a bowl of buttermilk." Id. at 202.

In this case, the factual allegations present not only an issue which requires expert testimony but also present disputed genuine issues of material facts, as to (1) whether Dr. Adcock was notified of plaintiff's pre-existing heart condition and was offered plaintiff's EKGs which he allegedly did not review to assess and determine the appropriate diagnosis and treatment of the plaintiff, (2) whether

he negligently failed to take an appropriate medical history of Mr. Boburka, (3) (sic) whether he negligently and inappropriately examined Mr. Boburka, and, (3) whether he negligently and inappropriately discharged Mr. Boburka from the emergency room on August 18, 1984, when his medical condition warranted further diagnostic procedures, testing and hospitalization.

The Court finds, based upon the law in Tennessee with regard to medical malpractice actions, this case is inappropriate for summary judgment. See Bowman v. Henard, 547 S.W.2d 527 (Tenn. 1977).

Accordingly, the defendant's motion for summary judgment is denied.

IT IS SO ORDERED this 15 day of August, 1989.

\s\

ODELL HORTON, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

THEODORE THOMAS BOBURKA,	*	
Plaintiff,	*	
vs.	*	No. 88-2089-H
FRANK ADCOCK, M.D.,	*	
Defendant.	*	

ORDER DENYING MOTION IN LIMINE

On August 2, 1990, defendant Frank Adcock, M.D., filed a Motion in Limine, seeking an order excluding the testimony of plaintiff's expert Dr. Franklin T. Tew from these proceedings. A

memorandum in support of such motion was filed, and oral argument was had in this matter on October 18, 1990.

Defendant has asserted that Dr. Tew has not practiced his profession or specialty in Tennessee or a contiguous bordering state during the year of this litigation, and that, under Tenn. Code Annot. §29-26-115(b), and FED. R. EVID. 601, Dr. Tew should not be allowed to testify in this litigation.

Plaintiff concedes that Dr. Tew does not satisfy the "contiguity" rule, but relies upon the last sentence in Tenn. Code Annot. §29-26-115(b), which says:

> "The court may waive this subsection when it determines that the appropriate witnesses otherwise would not be available".

Plaintiff's counsel argues that he is unable to obtain favorable testimony from plaintiff's local treating physicians because he has either successfully sued them for medical malpractice or has medical malpractice suits pending against them. He also says he has been unsuccessful in obtaining favorable testimony from other physicians with appropriate expertise in Tennessee or in contiguous states.

Additionally, counsel for plaintiff has argued that Dr. Tew is a treating physician, having treated plaintiff for the very condition said to have been caused or aggravated by defendant's alleged malpractice.

While it is true, as defendant argues, that Tenn. Code Annot. §26-26-115(b) has been applied as written by appellate courts in Tennessee, it is also true that the statute allows a trial court some discretion to allow or disallow testimony from physicians from non-contiguous states "in the interest of equity and justice". Pyle by Pyle v Morrison, 716 S.W.2d 930, 933 (Tenn. App. 1986). The waiver provision should be applied liberally where plaintiff is unable, after reasonable diligence, to obtain expert witnesses to testify in his favor except by going out of Tennessee to noncontiguous states. Crumley v Memorial Hospital, Inc., 509 F.Supp. 531, 533 (E.D. Tenn. 1978), aff'd without opinion, 647 F.2d. 164 (6th Cir. 1981).

In light of plaintiff's predicament as above outlined, it appears that "appropriate witnesses" from Tennessee or contiguous states are not available, and Dr. Tew should be allowed to testify.

Defendant also argues that this case was originally filed in State court, where a State trial judge ruled that Tenn. Code Annot. §29-26-115(b) prohibited Dr. Tew from testifying, and that this constitutes the "law of the case". It appears, however, that this cause in State court was not removed to this court. Rather, plaintiff took a voluntary nonsuit and then re-filed in this court. There is no indication that this action by plaintiff was improper in any way. Defendant has not

contested plaintiff's right to proceed on the merits in this medical malpractice claim in this court.

The "law of the case" doctrine does not apply here, because this is not the same "case". Rather, the original "case" was aborted. This case constitutes a new birth, with life of its own. Decisions made in the aborted case are, at best, merely persuasive, and this decision by the State trial judge is not persuasive to this court.

Under these circumstances, the motion in limine filed by defendant is denied.

IT IS SO ORDERED.

Enter this 19 day of October, 1990.

\s\

JAMES H. ALLEN
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

THEODORE THOMAS BOBURKA,

Plaintiff,

v. No. 88-2089-HB

FRANK ADCOCK, M.D.,

Defendant.

MEMORANDUM AND ORDER DENYING
MOTION FOR SUMMARY JUDGMENT
NOTWITHSTANDING THE VERDICT
OR, IN THE ALTERNATIVE,
FOR NEW TRIAL, OR REMITTITUR

The trial jury decided the controverted facts of this medical malpractice lawsuit on June 17, 1991. The verdict against defendant, Dr. Frank

Adcock, M.D., was in the form of answers to specific interrogatories. The jury found that: (1) Dr. Adcock deviated from the standard of care required of emergency department physicians in this medical community, and (2) that Dr. Adcock,s negligence proximately contributed to the severity of the heart condition suffered by plaintiff, Theodore Thomas Boburka, resulting in the loss of the enjoyment of life by Mr. Boburka. The jury awarded Mr. Boburka damages against Dr. Adcock in the amount of $600,000.

On June 27, 1991, Dr. Adcock moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur. Mr. Boburka filed a response on July 19, 1991, to

which Dr. Adcock filed a supplemental memorandum on July 18, 1991.

The Court has read the motions, the supporting memorandum and, upon consideration of the same, concludes all of the motions should be overruled and denied.

Judgment Notwithstanding the Verdict

The Court cannot, in conformity with the law in this Circuit, grant defendant's motion for judgment notwithstanding the verdict.

> Judgment notwithstanding the verdict is not proper unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict. It should not be granted if there is a conflict in the evidence, and the credibility of the evidence is not to be considered in passing on a motion for judgment.

National Polymer Products v. Borg-Warner Corp., 660 F.2d 171, 178 (6th Cir. 1981) (quoting Reeves v. Power Tools, Inc., 474 F.2d 375,380 (6th Cir. 1973)).

The Sixth Circuit follows the minority view that in diversity cases, "state law governs the standard for granting directed verdict and judgment notwithstanding the verdict motions." Lewis Refrigeration Co. v. Sawyer Fruit, 709 F.2d 427, 430 n. 3 (6th Cir. 1988), See also, Warkentien v. Vondracek, 633 F.2d 1 (6th Cir. 1980). Therefore, the standard of review for the defendant's motion is governed by Tennessee law.

Under Tennessee law, motions for j.n.o.v. are reviewed under the same standard applicable to rulings on motions for directed verdict. See e.g., Kaley by Lanham v. Union Planters National Bank

of Memphis, 775 s.W.2d 607, 611 (Tenn. App. 1988). And according to Tennessee law, a trial court, when presented with a directed verdict motion, must:

> take the stronger legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn form the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.

Id. at 611 (quoting Holmes v. Wilson, 551 S.W.2d 682, 685 (Tenn, 1977)); accord, Arms v. State Farm Fire & Casualty Co., 731 F.2d 1245, 1248 (6th Cir. 1984).

If there is substantial evidence form which the jury could find in favor of the party against whom the motion is made, the motion for judgment notwithstanding the verdict should not be granted. The court in considering the motion must view the evidence in a light most favorable to the party against whom the motion is made. Littlejohn v. Rose, 768 F.2d 765, 770 (6th Cir. 1985), cert. denied, 106 S.Ct. 1260 (1986); Bellamy v. Bradley, 729 F.2d 416, 418 (6th Cir. 1984), cert. denied, 105 S.Ct. (1984).

Applying the controlling legal standard to this case, the Court concludes the motion for judgment notwithstanding the verdict should be denied.

MOTION FOR NEW TRIAL

Defendant advances fourteen reasons why the Court should grant its motion for judgment notwithstanding the verdict, for a new trial or for remittitur. Of the fourteen reasons stated in support of the motion, all but four were ruled upon during the course of the trial or during jury deliberations. The Court, after much reflection upon the evidence in the case, concludes the trial rulings are correct and should be reaffirmed.

The reasons stated in support of the motion, not addressed during trial are those claiming (1) the jury verdict must be based upon speculative evidence, (2) the special jury interrogatories were contrary to applicable substantive law, (3) the jury verdict is excessive and (4) the five day

interruption of the jury's deliberation unaccompanied by appropriate instructions was unfair and prejudicial. The Court will address each of these subjects.

Jury Verdict Based on Speculative Evidence

The jury verdict, in the Court's judgment, is not based upon speculative evidence. The discriminating manner in which the jury answered the special interrogatories submitted to them reflects this argument. The person who served as foreman of this jury is a certified public accountant. Another member of this jury is a clinical dental technologist at the University for Tennessee Dental School in Memphis, Tennessee. Expert medical testimony was presented by both parties. The

Court's recollection is that one juror had undergone a heart surgery procedure.

> A motion for a new trial is addressed to the sound discretion of the court, and should be granted if it will do substantial justice, the trial judge has the responsibility to weigh the evidence and to set aside the jury's verdict when, in his conscientious opinion, the verdict is contrary to the weight of the evidence.

Cecil Corley Motor Co., Inc. v. General Motors Corp., 380 F.Supp. 819 (M. D. Tenn., 1974).

The Court's conscientious opinion, after considering all of the evidence in this case, is that the jury's verdict is not contrary to the weight of the evidence. The Court agrees with the verdict.

Were Special Interrogatories Contrary to the Substantive Law?

Defendant claims the Court's special interrogatories for the jury were contrary to applicable substantive law because they omitted a required determination that as a result of defendant's negligence plaintiff suffered damages which would not otherwise have occurred. The Court presented an extensive charge on the law to the jury. The interrogatories were addressed to specific issues developed during the trial. These issues were fully addressed in the Court's charge. The interrogatories were tailored to these issues. Interrogatory #3 specifically illustrates the Court's point: Interrogatory #3 read (sic):

> If Dr. Adcock was negligent in his examination, diagnosis and treatment of Mr. Boburka during the 2:01 a.m. visit or the 6:45 a.m.visit, or both, on August 18, 1984, did this allged(sic) negligence on the part of Dr. Adcock proximately contribute to the severity of the heart condition suffered by Mr. Boburka August 24, 1984, resulting in the alleged loss of enjoyment of life Mr. Boburka Claims he has suffered?
>
> Yes_____ No_____

The Court concludes the defendant's claim that the special interrogatories were contrary to applicable substantive law is without merit.

Claim for Remittitur

The jury verdict in this case is not, in the Court's judgment, excessive. The Court is of the opinion it should not arbitrarily reduce the amount of damages awarded in this case. To do so would

deprive the parties of their constitutional right to a jury. Wright & Miller, Federal practice and Procedure: Civil §2815(1973) The Court repeatedly asked counsel for the parties to discuss possible settlement of the case. The Court's efforts at settlement were repeatedly rejected. At one point, defense counsel told the Court he would discuss settlement with his people only if the Court ordered him to do so. Otherwise, he was not interested. The Court Did not consider any such order. The motion for remittitur is denied.

Was the Five Day Interruption
of the Jury's Deliberation
Appropriately Addressed by the Court?

Finally, defendant complains the five day interruption of the trial was prejudicial. He claims

the jury was not adequately instructed. This reason supporting the motion is denied. The Court adequately instructed the jurors from beginning of the trial on how they should conduct themselves while serving as jurors.

Order

After careful consideration of all of the issues presented, consideration of the evidence in the case and upon the entire record, the Court concludes defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, or remittitur should be and the same is hereby denied.

It Is so Ordered: This 29 day of July, 1991.

/s/ Odell Horton
ODELL HORTON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

THEODORE THOMAS BOBURKA,)

Plaintiff,)

vs.) No. 88-2089

FRANK ADCOCK, M.D.,)

Defendant,)

ORDER DENYING MOTION TO RECONSIDER MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR A NEW TRIAL OR REMITTITUR

The Court has read and considered the motion, the supporting memorandum and the affidavit of Dr. Frank Adcock, M.D., filed August

8, 1991, requesting the Court to reconsider its order, docketed July 30, 1991, denying the motion for judgment notwithstanding the verdict or in the alternative for a new trial or remittitur.

While the Court in its July 30, 1991 docketed order used the word memorandum, the Court did, in fact, read every pleading, document and piece of paper filed in support of or in opposition to the defendant's motion. This Court presided over the trial. The attorney filing the motion to reconsider did not participate in the trial.

Upon consideration of the motion to reconsider its July 30, 1991 docketed order, the Court concludes oral argument is not necessary and the motion should be, in all things denied. The

issues presented have been addressed by the Court either during the trial or by way of rulings on post trial motions. What the defendant appears to be seeking is a retrial of the case by the Court through the expansion of litigated issues in post trial motions.

Defendant's motion requesting the Court to reconsider his motion for judgment notwithstanding the verdict, or in the alternative for a new trial or remittitur is hereby denied, which is so ORDERED, this 20 day of August, 1991.

/s/ Odell Horton
ODELL HORTON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Case No: 91-6105

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

THEODORE THOMAS BOBURKA

Plaintiff - Appellee

v.

FRANK ADCOCK, M.D.

Defendant - Appellant

BEFORE: RYAN, BOGGS and BATCHELDER, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellee,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, CLERK

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

SANDRA K. KILPATRICK and WILLIAM KILPATRICK,	)	
Plaintiffs-Appellants,	)	
v.	)	Shelby Law
JAMES W. BRYANT, M.D.,	)	
Defendant-Appellee.	)	

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be granted.

PER CURIAM

From the Testimony of Dr. Franklin T. Tew:

A. Obviously one cannot state with absolute certainty whether an outcome would have been different or not if the patient had been hospitalized on the 18th. But given the tools and the treatment we have nowadays, including 1984, the patient certainly had an excellent chance of being much better managed with a significant chance of reducing the amount of heart injury if he had been hospitalized on the 18th rather than on the 24th.

Q. Thank you doctor.

Now, doctor, I would like to ask you at this time if you can state with any particularity what types of more favorable outcome might have been expected by a treatment on the 18th rather than on the 24th. Are you talking about in terms of reduced pain or longevity, or exactly what are you talking about?

A. I am talking about longevity. I'm talking about a reduced amount of heart muscle injury with prompt, more aggressive treatment. There are things that one can do in 1984 and today, if you do them early enough you can reduce or prevent heart muscle injury.

And this patient was not even given the benefit of an electrocardiogram or hospitalization to perhaps see if perhaps his back pains, which were unusual in nature to be heart, but none the less do occur to see if it was in his heart.

And I could understand perhaps the first time that the patient may have had expansion musculoskeletal injury but I think that when the patient returns a second time within a few hours and a patient again has not had anything more than a cursory exam, I do not think this is proper care and proper treatment.

(Dr. Franklin T. Tew, TR., Vol. III, pp. 435-437)

Q. Doctor, as regards to the condition of Mr. Boburka heartwise or as far as his heart concerned, he is doing well, is he not?

A. He's stable.

Q. Well and doing well?

A. No, sir, he's not. He has to take a lot of medicine and has to take them several times a day. His endurance is about two-thirds (2/3) of what it should be. He looks to rest usually mid-day, early afternoon because of fatigue due to the impairment of his heart performance and loss of heart reserve.

And his longevity is significantly reduced. The major determinant of longevity in a heart patient is what your heart pump function is.

Q. Are you saying that is related to a heart attack?

A. Yes.

Q. Or to the surgery?

A. To the heart attack.

Q. And whenever that heart attack occurred?

A. Yes sir.

(Dr. Franklin T. Tew, TR., Vol. III, pp. 462-463).

From the Testimony of Theodore Thomas Boburka:

Q: What was your condition on the 23rd in your perspective from a layman's perspective, what did you do on the 23rd?

A: On the 23rd I very definitely remembered leaving work very early, and I went home because it -- all week long it felt like I had the flu, whenever I would exert myself I was just feeling lousy. And -- and I was like that all week. And so I got home on the night of the 23rd and I went to bed.

Q: Do you remember waking up on the morning of the 24th?

A: Yes.

Q: What was your condition when you woke up from your perspective?

A: Well, all during the night of the 23rd and the morning of the 24th I was coughing continually, I was just -- I was just coughing, well, actually almost all week every night when I would lay down to sleep I would start coughing and coughing like postnasal drip.

So, when I got up in the morning of the 24th, I felt like lousy, like I was nauseous and a real bad case of the flu. I went in took a shower, and I just didn't feel good at all, I was just real punky (sic). And I noticed I was just having a hard time bending my body, it just didn't want to bend. It was -- I felt stuffed, constipated, oh, sick to my stomach something terrible, and I just started feeling so nauseous and nauseous, I woke Heather up and I said come on kid, let's go back to the emergency room.

(Theodore Thomas Boburka, TR., pp. 329, 330).

From the Testimony of Dr. Frank Adcock:

Q: We know that at least you feel that on the 24th he wasn't having musculoskeletal pain that day; he was having a heart attack.

A: He has (sic) having a cardiac calamity.

Q: By "calamity" do you mean that on the 24th he was very ill?

A: Yes, sir.

Q: Was he dying?

A: If he had been left alone without attention, there would be a good chance that Mr. Boburka would not have survived that event that took place that day, yes, sir.

Q: He was critically ill?

A: Yes, sir.

(Dr. Frank Adcock, TR., pp. 7, 8)

Q: I don't make an issue. What do you think he meant by the next sentence, Doctor? Read it to the ladies and gentlemen of the jury and what it says for the morning of the 25th

there, what the next sentence in the progress note says.

A: Looks fine, sitting up and reading a novel.

Q: Doctor, on your copy, is "novel" written in gigantic capital letters that are blacked out about twice as big as anything else on that page?

A: It's highlighted, yes, sir.

Q: Not by a highlighter. We're talking about the way the doctor wrote it; aren't we?

A: Well, you said the way the doctor wrote it, I notice that there's no doctor's signature on this, on either note.

Q: :'s on the doctors (sic) progress record; isn't it?

A: No, sir. I can't say that it is.

Q: Oh. That's not the progress record there that we have been talking about all this time?

A: The right half of it is the doctors (sic) process (sic) record, yes, sir.

Q: All right, sir. That's where we're reading from; isn't' it?

A: Yes, sir.

Q: All right.

A: But there's no signature after the note.

Q: Well, I believe there is and I will show you that in a second, Doctor. But let me ask you this: Right there where it says "novel", it's got an exclamation point at the end of that; doesn't it?

A: Yes, sir.

Q: No. Excuse me, Doctor. It's got two exclamation points there at the end of that; doesn't it?

A: Yes, it does.

Q: Does that insinuate anything, notably, that a patient is looking fine, sitting up and reading a novel the next morning after he was in critical condition in your emergency room the day before?

A: Yes, sir. After the catastrophic event that took place with all the treatment and diuresis that he had, Mr. Boburka -- and I, too, agree that he looked better, according to this note at 11:50. ...

(Dr. Frank Adcock, TR., pp. 426, 427)

Q: Doctor, what is IPPB?

A: That's an intermittent positive pressure breathing, is what the four letters stand for. It's used --

Q: Bronkosol?

A: Bronkosol is a bronchodilator usually given by an --

Q: Excuse me just one second. Nitrostat?

A: Nitrostat is Nitroglycerin that is manufactured in a patch form, in the main, so it can be placed on the patient's chest and absorbed through the skin.

Q: What's Nitrol Ointment?

A: Same thing.

Q: What's Lasix?

A: Lasix is a diuretic to relieve you of excess fluid.

Q: What's D5&W?

A: That's an intravenous fluid, Dextrose, five percent, with plain water.

Q: What's MS?

A: Morphine Sulfate.

Q: What's Aminophylline?

A: Aminophylline is also a bronchodilator that is given to inhale, or intravenous.

Q: What are rotating tourniquets?

A: Rotating tourniquets are a way to relieve work load on the heart when a patient is in severe distress. And what you do, you attach tourniquets to all four extremities. And three of them are on and one of them is off at all times. And they rotate around. And what it does is prevent fluid from coming back to the heart on the patients in distress and therefore, reducing the work load.

It's called rotating because you don't want to leave the tourniquet on an extremity for a long time. So the machine automatically rotates inflation and deflation on the machine. So that you don't hurt the patient's extremities.

Q: What's Tridic, T-R-I-D-I-C? Are you familiar with that?

A: No, sir. I have never heard of that. That's Tridil, T-R-I-D-I-L.

Q: What is that, please?

A: That's a nasal dilator.

Q: There are all things that Doctor Kapooth ordered for Mr. Boburka on the morning he came to the hospital after you walked out of the room; aren't they?

A: If you just read the list straight down, I will say, yes, sir.

Q: That's how Doctor Kapooth treated that patient that was having the heart attack. It that questionable in your mind? Isn't that true?

A: On August 24th?

Q: Yes, sir.

A: Yes, sir, the morning of.

(Dr. Frank Adcock, TR., pp. 93, 94, 95).